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Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine

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Article

Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine

Mary De Ming Fan*

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I. Introduction

For decades, criminal justice officials have based key decisions about a defendant's fate and crime deterrence on a tool deplored by practitioners for its indecipherability and potential for inaccuracy or incompleteness—the rap sheet.[1] Though the Supreme Court's criminal rights evolution progressed late last year to requiring rigor in documenting penalty maximum-enhancing prior convictions,[2] the problem of the rap sheet has received little notice from jurists and scholars because the rap sheet plays its central role in discretionary decision-making areas shielded from scrutiny.[3]

The rap sheet is not just a practitioner's problem. The flawing of the rap sheet is a parable about the perils of a judicial doctrine that was ostensibly overruled and then resurrected in a more potent incarnation. The story of how rap sheet flaws came to be is also a tale of federal timidity in taking an essential leadership role because of judicial rhetoric and rules about noninterference with traditional state functions like criminal law enforcement. Lost in the contortions of the traditional state functions doctrine over the decades is a necessary countervailing federalism-based doctrine permitting national leadership on problems calling for a coordinated solution.

The federal government has no business and no interest in regulating many issues within domains traditionally controlled by the states. But submerged within traditional state domains are problems, like rap sheet flaws, that call for national policy innovation and leadership unchilled by federal timidity in spheres of traditional state control.

This article finds buried in the rise, demise, and stealth resurrection of the traditional state functions doctrine the roots of a countervailing principle. The contours of the principle have been obscured in the contortions of federalism doctrine over the decades. This article derives from the evolution of the traditional state functions doctrine a countervailing federalism-based principle permitting fruition of federal leadership on problems submerged in state spheres but requiring national coordination.

The article proceeds in four parts. Part II details the rise, ostensible demise, and resurrection of the doctrine of noninterference with traditional state functions. Part II analyzes how, though the doctrine was superficially

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1. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE, at 38 (2001) [hereinafter USE AND MANAGEMENT OF CRIMINAL HISTORY] ("In the view of most experts, inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation's criminal history record information systems.").

2. *See* Shepard v. United States, 125 S. Ct. 1254, 1260 (2005) (majority in part, plurality in part) (limiting the materials on which jurists may rely on finding the fact of a prior conviction to "conclusive records made or used in adjudicating guilt").

3. *See infra*, Part III.A.

overruled, it mutated into more potent rules by the Court constricting the reach of federal legislation and interpretation of Congress's legislative power.

Part III explains how perpetuation of the repudiated notion deterred needed national leadership and policy innovation on an issue requiring a coordinated solution. Part III's account of the struggles over management of the computerized criminal history reporting system behind the rap sheet shows how federalism fears, stemming from notions of noninterference with a traditional area of state control, lead the national government to abdicate an essential leadership and standards-setting role.

Part IV details the two chief consequences of the leadership chilling effect on coordinating criminal history reporting: (1) accuracy, completeness, and decipherability problems of the rap sheet that have persisted to the present day; and (2) the costs to effective, accurate and efficient criminal justice posed by the persistent problems.

Part V derives from the doctrine surrounding the rise, demise and resurrection of the traditional state functions shield a countervailing federalism-derived principle permitting national leadership on problems submerged in spheres of traditional state control but requiring a national solution. Part V details how the countervailing principle would foster federal policy innovations in reforming the criminal rap sheet and address the new need, wrought by *Shepard v. United States*, for criminal justice information systems to contain scanned certified copies of court records "made or used in adjudicating guilt."[4]

II. The Rise, Demise and Resurrection of the Traditional State Functions Doctrine

A. The Rise

The doctrinal tale of the rise, demise, and resurrection of the traditional state functions is a story of contestation over power and the right of oversight between institutional actors. As Congress flexed its legislative authority in the New Deal era, states and state actors went to court to protest over the intrusion into state prerogatives. Ultimately, the courts flexed the most muscle of all during the contestation, wielding judicial power to strike legislation.

To summarize the story's start, state attempts to insulate "traditional" or "sovereign" state functions from federal regulation did not fare well before 1976. Though precedents foreclosed the claim, states and their agencies and officials kept trying when federal policy innovations affected their operations. The balance began to tip after Justice William Rehnquist ascended to the Court in 1972.

4. *See Shepard*, 125 S. Ct. at 1260, 1263.

Maryland v. Wirtz[5] encapsulates the law before Justice Rehnquist took the bench.[6] Under the banner of protecting "sovereign state functions," 28 states and a school district appealed to the Supreme Court in 1968, after Congress extended federal minimum wage and overtime requirements to protect employees in state hospitals, institutions, and schools.[7] The states and district argued that even federal regulation validly enacted under Congressional commerce clause power "must yield to state sovereignty in the performance of governmental functions."[8] The Supreme Court rejected the argument, relying on its precedent in *United States v. California*.[9] The Court, in *United States v. California*, ruled that federal regulation validly enacted under one of Congress's enumerated powers does not fail just because it extends to "activities in which the states have traditionally engaged."[10]

Given this line of precedent, Justice Marshall, writing for the majority, easily disposed of the next cry of foul to state sovereignty in *Fry v. United States*.[11] This time, the states chafed against a federally mandated wage freeze that extended to freezing salaries of state employees, in an attempt to bridle surging inflation.[12] Two state employees brought suit, claiming that the freeze on their salaries interfered impermissibly with "sovereign state functions."[13]

Fry rejected the argument that legislation validly enacted under the Commerce Clause fails upon interference with "sovereign state functions;" *Wirtz* had already held to the contrary.[14] Justice Marshall noted that when the need to curb inflation compelled the freeze in 1971, state and local governmental employees represented fourteen percent of the national workforce.[15] Justice Marshall concluded: "It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls."[16]

Justice Rehnquist was the sole dissenter.[17] Justice Rehnquist wrote that *Wirtz* was wrongly decided.[18] Constitutional protections for state

5. 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

6. Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

7. *Id.* at 187, 193.

8. *Id.* at 195.

9. 297 U.S. 175 (1936); *Wirtz*, 392 U.S. at 197-98.

10. *Id.* at 198 (quoting United States v. California, 297 U.S. 175, 185 (1937)).

11. 421 U.S. 542, 547 (1975).

12. *Id.*

13. *Id.*

14. *Id.* at 547-48.

15. *Id.* at 548.

16. *Id.*

17. Justice Douglas wrote a terse paragraph stating that because the wage freeze had expired, certiorari should have been dismissed. *Id.* at 549 (Douglas, J., concurring).

18. *Id.* at 559 (Rehnquist, J., dissenting).

sovereignty signified that "traditional state functions" were beyond the reach of congressional power to regulate under the Commerce Clause.[19] A State challenging encroachment on this affirmative constitutional protection was not arguing a lack of legislative power but "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority."[20]

Perhaps, Justice Rehnquist wrote, federal incursions into traditional state functions might survive if predicated on Congress's legislative authority during wartime, or under the Fourteenth and Fifteenth Amendments.[21] But enactments under the Commerce Clause must yield in traditionally state domains.[22] He did not explain the distinction. But the Court would later explain that the distinction was because the Reconstruction amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[23] Justice Rehnquist concluded by calling for the overruling of *Wirtz*.[24]

Perhaps as reassurance to Justice Rehnquist, or perhaps to accommodate others in the majority coalition, such as Justices Powell, Burger and Blackmun, Justice Marshall's majority opinion in *Fry* noted, in a footnote:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[25]

The next year, the sole dissent would become law, and the footnote would become the foundation for the new construction atop overturned precedent.

In *National League of Cities v. Usery*,[26] the States, joined by cities and intergovernmental groups, were back at protesting minimum wage and overtime laws, now applicable to all formerly shielded state employees except executive, administrative or professional personnel.[27] This time,

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19. *Id.* at 557-58.

20. *Id.* at 543.

21. *Id.* at 558-59.

22. *Id.* at 559.

23. City of Rome v. United States, 446 U.S. 156, 179 (1980); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION *xiii-xv*, 293-94 (1998) (explaining that the Reconstruction amendments broadened congressional authority to regulate the States because the amendments were forged in the understanding of the need for federal succor following slavery and the Civil War).

24. *Fry*, 421 U.S. at 559.

25. *Id.* at 547 n.7 (majority opinion)

26. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

27. *Id.* at 837-38.

Justice Rehnquist's view won the vote of four other justices, and he wrote the majority opinion.

Justice Rehnquist held that "there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.".[28] Quoting Justice Marshal's Tenth Amendment footnote in *Fry*, Justice Rehnquist wrote: "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."[29]

Justice Rehnquist invoked a notion of constitutional protection for "the independent authority of the States" "within their proper spheres."[30] States had "plenary authority" over "'functions essential to separate and independent existence'" that Congress could not abrogate.[31] Therefore, *National League of Cities* held, regulation cannot interfere with "the States' freedom to structure integral operations in areas of traditional government functions."[32] What constituted the "traditional governmental functions" immunized from federal regulation? *National League of Cities* set forth no clear test but gave examples: "fire prevention, police protection, sanitation, public health, and parks and recreation."[33] In a final coup de grace, Justice Rehnquist overruled *Wirtz*, as he had called for in dissent just the year before.[34]

But Justice Rehnquist upheld *Fry* in a passage suggesting that sovereign state spheres where not wholly impenetrable.[35] In explaining why *Fry* remained valid, *National League of Cities* suggested a possible countervailing principle:

> The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze . . . displaced no state

28. *Id.* at 845.

29. *Id.* at 843.

30. *Id.* at 844 (quoting Lane County v. Oregon, 74 U.S. 71, 76 (1868).

31. *Id.* at 845-46 (quoting Coyle v. Oklahoma 221 U.S. 559, 580 (1911)).

32. *Id.* at 851-52.

33. *Id.* at 851.

34. *Id.* at 853-55.

35. *Compare* Fry v. United States, 421 U.S. 542, 549 (1975) (Rehnquist J., dissenting) (arguing that *Fry* transgressed the Tenth Amendment) *with Nat'l League of Cities*, 426 U.S. at 852-53 (holding that *Fry* is consistent with the Tenth Amendment holding).

> choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves . . . . Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them . . . . The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."[36]

Thus, Congress could penetrate traditional state spheres with narrowly tailored, time-limited legislation to address problems that require "collective action by the National Government" so long as Congress was acting within its constitutional grants of legislative power.

Justice Blackmun, the swing voter[37] in *National League of Cities*' 5-4 majority, wrote a brief concurrence to underscore that *National League of Cities* did not "outlaw federal power . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[38] Justice Blackmun's concurrence and Justice Rehnquist's caveat sketched the contours of a possible countervailing principle to the traditional state functions doctrine for problems requiring nationally coordinated solutions. The indistinct contours of the potential principle were never delineated, however, because federalism doctrine soon shifted.

B. The Demise

Given its foundation on felled precedent and a tentative swing vote, *National League of Cities* naturally lurched. The shift started nearly imperceptibly.

The Court again confronted a claim of federal interference with a traditional state function when coal miners brought suit to invalidate the federal Surface Mining Act, which was enacted to protect land from destructive coal-mining, and gave states the choice of implementing plans that met federal standards or face federal preemption.[39] Relying on *National League of Cities*, the district court ruled the legislation contravened the Tenth Amendment by interfering with the States' "traditional [governmental] function[]" of regulating land use.[40]

Justice Marshall, author of *Fry*, wrote the majority opinion, and

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36. *Nat'l League of Cities*, 426 U.S. at 853 (quoting Wilson v. New, 243 U.S. 332, 348 (1917)).

37. Blackmun's hesitant concurrence beginning, "I may misinterpret the Court's opinion," marks him as the swing voter. William Cohen, *Justice in the Balance*, 81 VA. L. REV. 927, 942 n.130 (1995).

38. *Nat'l League of Cities*, 426 U.S. at 856.

39. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 271-72, 280-81 (1981).

40. *Id.* at 273-74.

structured *National League of Cities*' celebration of the Tenth Amendment into a more contoured and limited four-part test. Justice Marshall ruled that petitioners asserting the invalidity of federal legislation enacted under congressional commerce clause power must show three things: (1) "the challenged statute regulates the 'States as States,'" (2) the regulation addresses "matters that are indisputably 'attribute[s] of state sovereignty'" and (3) the States' "compliance with the . . . law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"[41] In a footnote, Justice Marshall also alluded that intervention may be permissible for "situations in which the nature of the federal interest advanced may be such that it justifies state submission."[42]

The challenge to the Surface Mining Act failed on the first prong, the Court ruled, because the Act governed the activities of coal miners, not States as States.[43] The Act did not compel states to enforce federal standards, spend state money or participate in a federal program at all.[44] If a state refused to submit a compliant program, then the federal government would regulate the coal miners.[45]

In the Surface Mining Act, Justice Marshall saw a friendlier form of federalism than the jostling for turf of the state functions view. He wrote that the Act, at most, "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[46] Justice Rehnquist concurred hesitantly in the result.[47]

Justice Rehnquist would be among the dissenters, however, when the Court considered a Congressional policy innovation to address the heavy consumption of oil and gas by electrical utilities.[48] Among other things, the legislation required state energy regulators to "consider" federal standards during utilities rule-making and mandated notice and comment procedures for state regulators to follow during the consideration.[49] The district court ruled the provisions violated the Tenth Amendment, finding that "they constitute a direct intrusion on integral and traditional functions of the State of Mississippi."[50]

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41. *Id.* at 287-88 (quoting *Nat'l League of Cities*, 426 U.S. at 854, 845, 852).

42. *Id.* at 288 n.29.

43. *Id.* at 288.

44. *Id.*

45. *Id.*

46. *Id.* at 289.

47. *Id.* at 307, 307-13. Justice Rehnquist wrote in order to note his disquiet over whether the Court was broadening Congressional power to enact legislation under the claim of substantial effects on commerce. *Id.* at 313.

48. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 758 (1982); *see also id.* at 782 n.9 (O'Connor, J., dissenting) (musing that the "novelty" of the statutory scheme may have obscured the affront to *National League of Cities* posed by the statute).

49. *Id.* at 746, 749.

50. *Id.* at 753.

The swing voter on *National League of Cities*, Justice Blackmun, wrote for the majority and found no Tenth Amendment violation. Justice Blackmun converted the requirement that state authorities consider federal standards and procedural requisites into a choice: "if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals."[51] He acknowledged the choice was coercive, because states cannot easily abandon the historically state duty of regulating public utilities and, unlike in the Surface Mining Act, Congress did not provide for an alternative mechanism to fill the regulatory void if the state opted out.[52] But, Justice Blackmun ruled, "it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to coerc[e] the States into assuming a regulatory role by affecting their freedom to make decisions in areas of integral governmental functions."[53]

Sandra Day O'Connor, the newest Justice on the Court and a former state legislator and state judge, penned a vividly indignant partial dissent, joined by Justice Rehnquist and Chief Justice Burger. She believed the mandate that states consider federal standards and follow prescribed procedure violated the Tenth Amendment restrictions divined in *National League of Cities*.[54] The emphatic phrases she used were so striking, the majority collected a few choice ones:

> Justice O'Connor's partial dissent . . . variously accuses us of "conscript[ing] state utility commissions into the national bureaucratic army," of transforming state legislative bodies into "field office of the national bureaucracy," of approving the "dismemberment of state government," of making state agencies "bureaucratic puppets of the Federal Government," and—most colorfully—of permitting "Congress to kidnap state utility commissions."[55]

Justice O'Connor's vivid partial dissent demonstrated that Justice Rehnquist had a new ally with an equal ardor for state independence.

Though Justice Blackmun had labored mightily in *FERC* to avoid grappling with *National League of Cities* and falling into the Tenth Amendment fray, Justice Brennan took *National League of Cities* head-on the next year and watered it down. Justice Brennan, who had authored an anguished dissent for three justices in *National League of Cities*,[56] mustered

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51. *Id.* at 764.

52. *Id.* at 766-67.

53. *Id.* at 766 (internal quotations omitted).

54. *Id.* at 775-82.

55. *Id.* at 767 n.30 (quoting O'Connor's dissent at 775, 777, 782, 783, and 790).

56. Nat'l League of Cities v. Usery, 426 U.S. 833, 856-880 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Brennan, J., dissenting); *see also id.* at 856, 856 (Blackmun, J., concurring) (characterizing Justice Brennan's dissent as "despairing[]").

a majority in *EEOC v. Wyoming*[57] for the proposition that "*National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence[.]'"[58] Justice Brennan read into the third prong of the *National League of Cities-Hodel* test a high bar for showing impairment of state control over traditional governmental functions—federal intrusion must threaten States' "separate and independent existence."[59] Given the raised bar, Wyoming's Tenth Amendment challenge to the application of federal age discrimination protections to a state game warden failed, even though "[t]he management of state parks is clearly a traditional state function."[60]

The express toppling of *National League of Cities* came in 1985, when the allies against *National League of Cities* succeeded in winning swing voter Justice Blackmun to their camp.[61] In *Garcia v. San Antonio Metropolitan Transit Authority*, a 5-4 majority overruled *National League of Cities*'s "traditional governmental function" standard as "unworkable."[62]

The issue again was federal minimum wage and overtime laws.[63] The state governmental function was mass transit, which, though state-run, received federal subsidies.[64] Four months after *National League of Cities*, the San Antonio Transit System informed its employees that it was no longer obligated to follow the Fair Labor Standards Amendments' provisions on overtime.[65] The Department of Labor disagreed and state and federal authorities went to district court, which ruled that "local public mass transit systems . . . constitute integral operations in areas of traditional governmental functions" and were shielded by *National League of Cities*.[66]

Federal authorities and a state employee appealed to the Supreme Court.[67] While the matter was pending, the Supreme Court unanimously ruled that a commuter rail service run by the state-owned Long Island Railroad was not a "traditional governmental function" and thus was not immunized from regulation under *National League of Cities*.[68] The Court vacated the district court judgment in *Garcia* and other cases involving state transit and remanded to the district court for reconsideration in light of its recent railroad decision.[69] The district court again found municipally-

57. 460 U.S. 226 (1983).
58. *Id.* at 236 (quoting *Nat'l League of Cities*, 426 U.S. at 845).
59. *Id.* at 239 (quoting *Nat'l League of Cities*, 426 U.S. at 851).
60. *Id.*
61. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
62. *Id.* at 531.
63. *Id.* at 533.
64. *Id.* at 531-33.
65. *Id.* at 534.
66. *Id.* at 534-35 (quoting Appendix D to Juris. Statement in No. 82-1913 p.24a).
67. *Id.* at 535.
68. *Id.* (quoting United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686 (1982).
69. *See* Garcia v. San Antonio Metro. Transit Auth, 457 U.S. 1102 (1982).

owned and operated mass-transit to be a traditional governmental function—though three Federal Courts of Appeals and one state appellate court had reached the opposite conclusion.[70]

Surveying the scene of confused lower courts on standards for defining traditional governmental functions, Justice Blackmun, writing for the Court, noted the Court itself had difficulties developing a measure of the traditional.[71] The Court had relied on history but "simultaneously disavowed 'a static historical view of state functions generally immune from federal regulation.'"[72] The Court had also stated the inquiry into the traditional "was merely a means of determining whether the federal statute at issue unduly handicaps 'basic state prerogatives'"—but did not define what a basic prerogative was.[73] Because judicial determination of "traditional" functions was "unsound in principle and unworkable in practice," the Court rejected the standard and pointed to a different "measure of state sovereignty"—the political process.[74] Constitutional design of the federal system ensured that the federal government "will partake sufficiently of the spirit [of the States] to be disinclined to invade the rights of the individual States, or the prerogatives of their governments."[75]

Justice Powell's dissent, the principle piece joined by all four *National League of Cities* adherents, shows the lost attempt to keep Justice Blackmun's vote. The dissent argued that Justice Blackmun's balancing test in *National League of Cities* offered a workable standard for delineating limits on congressional power in protected state domains.[76] In explaining how the balancing approach offered a workable standard, however, the dissent changed the Blackmun test's key features—reducing it to the balancing "of the federal interest in the challenged legislation and the impact of exempting the States from its reach."[77] In Justice's Powell's formulation, the focus was on an institutional battle, not the needs of the nation and people for whom the safeguards of federalist structure were designed.

In Justice Powell's changed version, the "central" inquiry was "how closely the challenged action implicates the central concerns of the Commerce Clause"[78]—not whether federal leadership was essential. Services like police protection and fire prevention were remote from commerce and epitomized traditional governmental functions, and thus

70. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530, 535-36 (1985).

71. *Id.* at 538-39.

72. *Id.* at 539-40 (quoting *United Transp. Union*, 455 U.S. at 686).

73. *Id.* at 540 (quoting *United Transp. Union*, 455 U.S. at 686-87).

74. *Id.* at 546-47, 550.

75. *Id.* at 551 (quoting THE FEDERALIST NO. 46, at 332 (B. Wright ed. 1961); *see also id.* at 555-57.

76. *Id.* at 562.

77. *Id.* at 563 n.5.

78. *Id.*

were shielded under Justice Powell's revised test.[79]

In contrast, Justice Blackmun had sketched "a balancing approach [that] does not outlaw federal power . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[80] The central criterion of Justice Blackmun's test was the need for collective action, not notions of what constituted core Commerce Clause concerns, remote topical enclaves, or the impact on the States.

Justice O'Connor also offered a dissent notable for its vision of "a 'burden of persuasion on those favoring national intervention'" and characterization of national action as "exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.'"[81]

Most notable of all was Justice Rehnquist's brief separate dissent. Though only a paragraph long, it frankly predicted the course of the law to come. Justice Rehnquist highlighted that Justice Powell's balancing test and Justice O'Connor's approach were not "precisely congruent with Justice Blackmun's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas 'where the federal interest is demonstrably greater.'"[82] "But," Justice Rehnquist concluded, "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[83]

C. The Revival

Later the same year *Garcia* was decided, William W. Van Alstyne memorably called *Garcia* "The Second Death of Federalism."[84] Justice Rehnquist's parting prediction would prove the more prescient, however. The traditional state functions doctrine would be resurrected in the form of potent interpretive rules curtailing the reach of federal legislation and constricting interpretation of Congress's legislative power. The new rules would not be limited by the other prongs of the *National League of Cities-Hodel* test or the nascent Rehnquist-Blackmun principle.

1. Reincarnation as a Canon Crippling the Reach of Legislation

During the brief dominion of *National League of Cities*, deference

79. *Id.* at 575.

80. *Id.* at 580-81.

81. *Id.* at 587 (quoting Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COL. L. REV. 543, 544-45 (1954)).

82. *Id.* at 580 (quoting *Nat'l League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring)).

83. *Id.*

84. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

to states in spheres of traditional state control seeped into statutory interpretation. But it was after *Garcia* overruled *National League of Cities* that a general presumption against reading federal statutes as reaching traditional state functions solidified.

During the brief regime of *National League of Cities*, the Court considered whether a federal act concerning treatment for the mentally disabled applied to all states or just states taking federal money.[85] If the legislation applied to all states, then Congress had used its power to enforce the Fourteenth Amendment.[86] But if the legislation only applied to federally funded states, then Congress was merely deploying the power of its purse.[87] Justice Rehnquist, writing for the Court, ruled: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[88] The question was easy and the Justice Rehnquist's note unnecessary, however, because the Solicitor General had conceded that the legislation was enacted under Congressional spending authority and applied only to states taking federal money.[89] The note nonetheless laid a beam for a rule of constrictive reading of legislation to shield state autonomy.

Another enunciation of the noninterference presumption came just a few months after the demise of *National League of Cities*. The author of the principle dissent in *Garcia*, Justice Powell, wrote for a 5-4 majority: "Congress may abrogate the States' constitutionally secured immunity . . . only by making its intention unmistakably clear in the language of the statute."[90] The deferential rule derived from the Eleventh Amendment, not the Tenth, and concerned the immunity of states from suits, a confined question. But the clear statement rule would not be so confined.

The breakthrough was *Will v. Michigan Department of State Police*.[91] The question was whether states were "persons" subject to suit under the venerable civil rights statute, 18 U.S.C. § 1983.[92] Citing *Pennhurst* and *Atascadero*, the Court characterized as "an ordinary rule of statutory construction" the requirement that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intent to do so 'unmistakably clear in the language of the statute.'"[93] What had been an extraneous note in *Pennhurst State and School Hospital v. Halderman* and a specialized rule for deciding

85. Pennhurst State & Sch. Hosp. v. Halderman, 451 U.S. 1, 15 (1981).
86. *Id.* at 15-16.
87. *Id.* at 17-18.
88. *Id.* at 16.
89. *Id.* at 15.
90. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).
91. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).
92. *Id.* at 60.
93. *Id.* at 65 (quoting *Atascadero State Hosp.*, 473 U.S. at 242).

whether a state had waived its Eleventh Amendment immunity had been elevated to a general canon of construction.

But not just any canon. While many canons are neutral aids to textual interpretation, governing grammar or punctuation, clear statement rules "represent substantive policy choices."[94] Because clear statement rules import considerations external to text, they may foreclose meanings actually denoted by text and structure, frustrating Congressional intent.[95] And when clear statement rules claim heritage in Constitutional values, they take on "quasi-constitutional" status and can conjure up a "Stealth Constitution," in the memorable words of William N. Eskridge, Jr. and Philip R. Frickey.[96]

The stealth revival of ostensibly rejected constitutional doctrine fully unfurled in *Gregory v. Ashcroft*.[97] The question was whether federal protections against age discrimination extended to state judges. In an opinion for the majority marked with intellectual echoes of her *Garcia* dissent, Justice O'Connor wrote that congressional power to legislate "in areas traditionally regulated by the States" was an "extraordinary power in a federalist system . . . that we must assume Congress does not exercise lightly."[98]

Garcia, Justice O'Connor wrote, "constrained" the Court from examining federalism limits on congressional powers under the Commerce Clause.[99] So Justice O'Connor reasoned around *Garcia*, writing that the Court need not examine the federalism issue if, applying a "plain statement rule," the Court concluded the challenged act did not apply to state judges.[100] Justice O'Connor's plain statement rule was that, absent unmistakably clear language, the Court would "not attribute to Congress an intent to intrude on state governmental functions"—even if Congress enacted legislation under the Fourteenth Amendment,[101] though the Fourteenth Amendment was "specifically designed as an expansion of federal power and intrusion on state sovereignty."[102]

The limiting reading avoided "a potential constitutional problem," Justice O'Connor wrote.[103] But *Garcia* held that the political process was

94. Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 132 (2004).

95. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 958-59 (1992); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

96. William N. Eskridge, Jr., & Philip R. Frickey, *The Supreme Court, 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 81-82 (1994).

97. Gregory v. Ashcroft, 501 U.S. 452 (1991).

98. *Id.* at 460.

99. *Id.* at 464.

100. *Id.*

101. *Id.* at 470.

102. City of Rome v. United States, 446 U.S. 156, 179 (1980).

103. *Gregory*, 501 U.S. at 464.

the "measure of state sovereignty."[104] So how could legislation vetted through the political process, without an allegation of procedural breakdown, pose a potential constitutional problem? Not under the *Garcia* conception of state sovereignty. But certainly under the *National League of Cities* view. Professors Eskridge and Frickey have read *Gregory* as reviving *National League of Cities*, "at least as a new super-strong rule of statutory interpretation."[105] Indeed, *Gregory* goes further in its development of state sovereignty jurisprudence than Justice Rehnquist's initial sketch in his *Fry* dissent. In his *Fry* dissent, Justice Rehnquist had suggested that his view would accommodate the history of the Reconstruction Amendments.[106] The new clear statement rule did not.

Gregory is further notable because Justice O'Connor had succeeded in writing her dissenting view in *Garcia* about changing the burden of persuasion regarding the validity of federal legislation into quasi-constitutional law.[107]

Since its rapid evolution, the quasi-constitutional principle of noninterference with traditional state functions has become prevalent. In a dataset of cases limited to workplace law issues decided between 1969 and 2003, James J. Brudney and Corey Ditslear found eleven opinions in which a majority of the Supreme Court has applied what the authors call "an 'anti-preemption' canon, presuming that absent explicit statutory language, federal law should be understood not to interfere with traditional or core state functions."[108] Ten of the eleven opinions were issued in 1984 or later.[109] Even the terminology of the canon unabashedly echoes the terminology of *National League of Cities*—from *Gregory*'s use of the canon to shield "state governmental functions" to even more recent uses of the canon by the Court to shield "traditional state functions."[110]

Thus, the state functions doctrine mutated into a new and even broader form. After the doctrine could not be wielded directly to strike legislation because of *Garcia*, it took a new incarnation and accomplished its aim indirectly by curtailing the reach of federal legislation into traditional state functions.

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104. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).

105. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 623 (1992).

106. *See* Fry v. United States, 421 U.S. 542, 559 (1975).

107. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 587 (1985).

108. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 43 (2005).

109. *Id.*

110. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Owasso Indep. School Dist. v. Falvo, 534 U.S. 426, 435 (2002); Gonzaga Univ. v. Doe, 536 U.S. 273, 286 n.5 (2002) (quoting *Falvo* 534 U.S. at 435).

2. Reincarnation as a Rule of Constrictive Reading of Congressional Legislative Power

The revival would not be limited to a canon merely curtailing the reach of federal legislation. The doctrine would be marshaled again as a limit on congressional authority to legislate. Though congressional legislation is generally presumed constitutional,[111] where the legislation trenched on traditional state functions, the state functions doctrine manifested as a rule of constrictive reading of Congress' enumerated power to act.

The opening came when Congress invoked its Commerce Clause authority to pass the Gun-Free School Zones Act, which concerned both criminal law enforcement and education, domains where "States historically have been sovereign."[112] Justice Rehnquist—now the Chief—wrote for the Court that the reach of congressional Commerce Clause authority "'must be considered in the light of our dual system of government'" so as not to "'effectually obliterate the distinction between what is national and what is local.'"[113] In other words, interpretation of congressional Commerce Clause authority would be limited by federalism doctrine to stay out of "what is local."

This holding was even broader than the holding of *National League of Cities*. Concern over encroachment into traditional state spheres manifested itself as a rule of constrictive reading of Congress' Commerce Clause authority. Instead of holding that an otherwise valid exercise of congressional Commerce Clause authority was curtailed by a cross-cutting limitation, *Lopez* held that Congress was not acting within its Commerce Clause authority. *Lopez* made its ruling into a limit on Congressional authority to act, not simply a federalism limit on an otherwise valid exercise of power.

In contrast, *National League of Cities* invalidated an enactment not on the ground that Congress lacked an affirmative grant of legislative power but that cross-cutting constitutional protections for state sovereignty constrained an exercise of otherwise valid legislative power.[114] *National League of Cities* did not constrict interpretation of independent constitutional text because of the state functions doctrine. But *Lopez* did.

In dissent, Justice Souter discerned the stealth revival of the rejected "notion that the commerce power diminishes the closer it gets to customary state concerns."[115]

Lopez would also go further than *National League of Cities* in

111. United States v. Morrison, 529 U.S. 598, 607 (2000).

112. United States v. Lopez, 514 U.S. 549, 564 (1995) (referring to criminal law enforcement and education as domains where "States historically have been sovereign").

113. *Id.* at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1936)).

114. Nat'l League of Cities v. Usery, 426 U.S. 833, 840-43, 845 (1976).

115. *Lopez*, 514 U.S. at 609.

another way. *National League of Cities* only applied to regulation of the "States as States."[116] The Gun-Free School Zones Act did not regulate the states at all. It regulated individuals. No state had petitioned for review in *Lopez*—a federally convicted criminal had. Even the *National League of Cities* doctrine could not have invalidated the Act—the first prong of its test would not have been met.[117] But the notion of the inviolability of traditional state turf in *Lopez* was sufficient alone.

Justice Rehnquist would later write that the "noneconomic, criminal nature of the conduct at issue was central" to the decision in *Lopez*.[118] The statute was a criminal one and "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law,'" Justice Rehnquist wrote.[119] If the Act was validly premised on Commerce Clause authority, Justice Rehnquist warned, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[120] Justice Rehnquist concluded the Act exceeded congressional Commerce Clause authority.

Justice Kennedy's concurrence underscores the revival of the traditional state functions doctrine in more potent form. Justice Kennedy wrote the Act interfered with education, "a traditional concern of the States," and thus "upset[] the federal balance to a degree that renders it an unconstitutional assertion of the commerce power."[121]

The rule of noninvasion of state turf would successfully swing again at legislation with much stronger foundations. Congress did not make findings about the impact on interstate commerce posed by ownership of guns in school zones for the Gun-Free Schools Act.[122] But for the Violence Against Women Act, which provided civil remedies for victims of gender-motivated violence, Congress assembled a "mountain of data . . . showing the effects of violence against women on interstate commerce."[123]

Again Justice Rehnquist wrote for the Court. Again, he emphasized that federalism limited the scope of Commerce Clause power to preserve "what is local."[124] Again he emphasized the need to preserve for states authority over the "traditional state concern" of criminal law

116. Nat'l League of Cities v. Usery, 426 U.S. 833, 854 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

117. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287-88 (1981) (rejecting claim under *National League of Cities* because challenged regulation did not regulate "States as States").

118. United States v. Morrison, 529 U.S. 598, 610 (2000).

119. *Lopez*, 514 U.S. at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

120. *Id.* at 564.

121. *Id.* at 580.

122. *Id.* at 562 (majority opinion).

123. *Morrison*, 529 U.S. at 628-29 (Souter, J., dissenting).

124. *Id.* at 608 & n.3, 616 n.6.

enforcement.[125] And he went a step further—suggesting that regardless of aggregate affects on commerce, Congress could never regulate under the commerce power on "the suppression of violent crime and vindication of its victims," which he viewed as quintessential of the "police power" withheld from Congressional commerce clause authority.[126]

Again Justice Souter, joined by new Justices Ginsberg and Breyer, discerned the revival of the rejected past.[127] Justice Souter read the majority opinion as holding that "some particular subjects arguably within the commerce power can be identified in advance as excluded" on grounds such as "the States have traditionally addressed it in the exercise of the general police power."[128] But the Court had already repeatedly rejected the theory of traditional state concern as a limit to Congressional power.[129] And the Court had already rejected the notion of "traditional state spheres of action" in favor of a more fluid notion of politics mediating between state and national interests.[130]

Concerns over safeguarding state power also inflected the Court's interpretation of Congress' power under Section 5 of the Fourteenth Amendment to enact laws enforcing the protections of the Fourteenth Amendment. Congress had amassed "voluminous" evidence of "pervasive bias in various state justice systems against victims of gender-motivated violence"—triggering Congress' power under Section 5 of the Fourteenth Amendment to enforce equal protection guarantees.[131] Even so, the Court ruled, there were limits on Congress' power to redress discrimination "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[132]

Congress' power to enforce the Fourteenth Amendment did not extend to regulating conduct by private individuals, the Court ruled.[133] And the legislation was not congruent and proportional to the problem, the Court further ruled.[134] The legislation visited consequences on the assailant, not state actors who were remiss in their duties to protect victims of gender-motivated violence by prosecuting the assailant.[135] Moreover, the legislation applied nationally, though, in the Court's assessment, the data

125. *Id.* at 611.

126. *Id.* at 618.

127. *Id.* at 640.

128. *Id.* at 639.

129. *Id.* at 645 (citing, *inter alia*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276-77 (1981)).

130. *Id.* at 647.

131. *Id.* at 619-20.

132. *Id.* at 620.

133. *Id.* at 619-25.

134. *Id.* at 625-26.

135. *Id.*

only demonstrated an under-enforcement problem in a few states.[136]

Thus, to protect the "balance of power between the States and the National Government" Congress invalidated a federal remedy for Christy Brzonkala, who by her account, was raped and assaulted by two men, one of whom received no sanctions from the state school where she sought redress, and the other of whom was merely suspended by the state school for two semesters for "using abusive language."[137] As Senior Circuit Judge John T. Noonan, Jr. depicted in his book *Narrowing the Nation's Power*, the abstract clash of institutions had effaced the human need at the core of governance.[138]

The Court plainly noted that its reading of the Fourteenth Amendment was inflected by concern with maintaining a balance of power between the states and the national government—though, as the Court has recognized, the Reconstruction amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[139] Though *Morrison* suggested its interpretation of Congress' Fourteenth Amendment Section 5 power flowed from precedent, as Robert C. Post and Reva B. Siegel have noted, *Morrison* actually imposed a further constriction on Congress' Section 5 power not rooted in the precedents *Morrison* cited.[140] The Court imported the state action requirement of Section 1 of the Fourteenth Amendment as a limit on Congress' authority to craft remedial legislation under Section 5.[141] Thus, even if state discriminatory action affronted the guarantees of Section 1 of the Fourteenth Amendment, triggering Congress' power to enact remedial legislation, Congress was limited in its ability to redress the wrong.[142]

Professors Siegel and Post wrote that "the Court never pauses to explain what it finds so very alarming in Congress' use of Section 5 power to create a civil cause of action for victims of gender-motivated violence."[143] An inference of what alarmed the Court can be drawn, however, from its earlier-expressed concern over federal intrusion into the "traditional state concern" of criminal law enforcement.[144] The legislation had trodden on state turf—"the suppression of violent crime and vindication

136. *Id.* at 626-27.

137. *Id.* at 601-03.

138. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 144-45 (2002).

139. City of Rome v. United States, 446 U.S. 156, 179 (1980); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION *xiii-xv*, 293-94 (1998) (arguing that the Reconstruction amendments broadened congressional authority to regulate the States because they were forged in the understanding of the need for federal succor following slavery and the Civil War).

140. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 474-76 (2000).

141. *Id.*

142. *Id.*

143. *Id.* at 481.

144. Morrison, 529 U.S. at 611, 618.

of its victims."[145]

Thus, in *Lopez* and *Morrison*, the Court resurrected the traditional state functions doctrine in more potent form. The doctrine influenced interpretation of independent Constitutional text. The traditional state functions doctrine had morphed into a rule of constrictive reading of Congress' enumerated powers to enact legislation reaching into traditional state spheres. *National League of Cities* held Congress may have the power to legislate but cross-cutting constitutional protections for state sovereignty stood in the way of an otherwise valid exercise of power.[146] The new interpretive rule of constrictive reading of independent text resulted in a holding that Congress did not even have the power to legislate in the first place.

In a sense, the Court had enshrined a clear statement rule of constitutional interpretation. In interpreting the limits of Congress' constitutional power to enact legislation, the Court presumed against authority to penetrate traditional state spheres in the absence of unmistakably clear language to the contrary—a direct language that the Constitution, by its spare and graceful architecture, could not supply.

When *National League of Cities* was overruled, Justice Rehnquist calmly noted that debate on the finer points of a countervailing principle to the traditional state functions doctrine need not be resolved in dissent because the doctrine would be revived later.[147] Though the doctrine has been revived in potent form, the Court has not developed the nascent countervailing principle to permit national leadership when necessary.

Against the backdrop of the dramatic revival of the traditional state functions doctrine unmitigated by limiting conditions, federal timidity in the quintessentially state sphere of criminal law is unsurprising. Taking the persistent problem of the criminal rap sheet, the next Part analyzes how the rise of the traditional state functions doctrine followed by its powerful revival without a mitigating countervailing principle has chilled necessary federal action on a law enforcement problem requiring a nationally coordinated solution.

III. Federal Tiptoeing In Traditional State Spheres and the Flawing of the Criminal Rap Sheet

A. The Rap Sheet's Role

Because of its role in criminal justice and the necessary interstate coordination for its generation, the rap sheet is a paradigmatic issue requiring national leadership. The rap sheet's role may not be readily familiar because it structures decision-making in areas outside of the showy

145. *Id.* at 618.

146. National League of Cities v. Usery, 426 U.S. 833, 840-43, 845 (1976).

147. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579-80 (1985).

centerpiece of criminal justice, the trial. This section supplies context before proceeding to the history of federal timidity in managing rap sheet reporting.

Rap sheets direct official decision-making at the key points in the criminal process—from investigation to bail-setting to charging to plea-bargaining to sentencing. The National Task Force on Increasing the Utility of the Criminal History Record has identified twenty-eight points in the life of a criminal case where officials rely on criminal history records as a major basis for their decisions.[148] Mistakes in the rap sheet mean wrong decisions involving a defendant's fate and unwarranted additional jail time or, conversely, inadequate jail time to account for the seriousness of the defendant's criminal history and the need for heightened deterrence.[149]

At the investigation stage, police use criminal history to find possible suspects or eliminate suspects imprisoned at the time a crime was committed[150] Criminal history information can also help support a search warrant.[151] FBI officials estimate that two-thirds of people arrested for serious offenses have prior arrests.[152] About twenty-five to thirty percent are "multi-State" offenders, with "Federal and State records or arrests in more than one state."[153]

When police present their case to the prosecutor's office, criminal history may mean the difference between a decision to prosecute or to cut the defendant loose. Many jurisdictions have prosecution guidelines as to when a case will be accepted for prosecution. Often, criminal history is a key consideration in the guidelines. Prosecuting a first-time offender driven by poverty to commit a nonviolent crime may not be the most judicious or just use of limited prosecutorial resources—particularly if a jurisdiction must deal with a flood of other offenders with much worse records committing the same crime.

After arrest and acceptance of a case by the prosecutor's office, criminal history is the key consideration about the amount of bail, if any, the defendant must put up to get out of jail.[154] Every state and the federal system expressly permit criminal history to be considered when bail is set at the initial appearance or modified later.[155] Many states "*require* criminal justice decisionmakers to take criminal history record information into

148. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INCREASING THE UTILITY OF THE CRIMINAL HISTORY RECORD: REPORT OF THE NATIONAL TASK FORCE 7 (1995) [hereinafter INCREASING THE UTILITY].

149. *The National System for Interstate Exchange of Criminal History Records: Hearings Before the Subcomm. On Patents, Copyrights, and Trademarks of the S. Comm on the Judiciary*, 98th Cong. 98-286 (1983) (statement of Donald L. Doernberg on behalf of the ACLU); INCREASING THE UTILITY, *supra* note 148, at 7.

150. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18.

151. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18.

152. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 73.

153. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18.

154. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18.

155. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18.

account."[156]

Rap sheet information may be the basis for jailing a person without bail during the long pendency of adjudicatory proceedings though the person has not been convicted of the charged offense. In many states and the federal system, if the defendant's criminal record demonstrates dangerousness or risk of flight, a court may order that the defendant be imprisoned without bail.[157] In the federal system, if the defendant's record reveals commission of a crime of violence or certain other crimes while on pretrial release, a presumption in favor of imprisonment without bail arises.[158] At detention hearings, rap sheet information is typically argued by the prosecutor and minimized by the defense attorney in support of their respective positions.[159]

Rap sheets further steer prosecutorial decisions about what charges to press, what plea bargain to give, and what sentences to seek.[160] As to charging, all states statutorily permit or mandate that defendants with specified numbers and types of criminal convictions be charged as repeat offenders, habitual offenders, or career offenders subject to enhanced prison terms.[161] As to plea bargains, rap sheets can make the difference between a defendant getting a deal and none at all. How good the deal is also depends on the rap sheet. Rap sheets are particularly critical in busy jurisdictions that offer defendants better deals—called "fast-track" early disposition programs in the federal system—if they promise to plead out early. In such jurisdictions, within a day or two after the defendant's arrest and initial appearance, a prosecutor must study the rap sheet—often the only documentation of prior criminal history in the file—to formulate an offer that will materially affect the length of time the defendant will serve, if any.

Rap sheet information is so heavily relied on because it is computer-searchable and comes fast. Criminal history information is frequently needed fast. For example, information for bail-setting is generally needed within 24 hours of arrest.[162] Information for charging the defendant by indictment or information or formulating a plea-bargain may be needed within less than a week of arrest, particularly in jurisdictions where prosecutors make early disposition offers.

Of all the multiple junctures where rap sheets matter, sentencing is where rap sheets figure most prominently. Various theories of punishment—"culpability (just punishment), deterrence, incapacitation and

156. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 50.

157. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 18-19; *see also* 18 U.S.C. § 3142(e).

158. 18 U.S.C. § 3142(e).

159. *See* USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 19.

160. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 19.

161. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 19.

162. Sally T. Hillsman, *Disposition Reporting: The Perspective from the Courts*, *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE ON CRIMINAL HISTORY RECORDS: BRADY AND BEYOND 56 (1994).

limited rehabilitation potential"—all point to the conclusion that criminal history should matter greatly as to what sentence a defendant should get.[163] And it does: Guides for sentencing frequently calibrate sentence ranges to criminal history.[164]

The judge generally learns about criminal history from the presentence report prepared by probation officers.[165] And probation officers drafting presentence reports generally rely on fingerprint-verified rap sheets as a starting point for criminal history assessments.[166] Probation officers then follow up by performing the laborious task of requesting documentation from the various jurisdictions where the defendant was convicted for committing other crimes.

When the defendant goes to jail, the presentence report—including its determination of the defendant's criminal history—goes too. The presentence report guides correctional decisions on classification of the defendant while in prison, parole decisions, and parole revocation decision if the defendant errs on release.[167] Thus, from start to finish in the criminal justice system, the rap sheet figures heavily in decisions materially affecting a defendant's liberty and determining adequate deterrence against future criminal conduct.

B. Federal Timidity in Managing Rap Sheet Reporting

The term rap sheet denotes the computer print-out that officials rely on in decision-making. Behind that print-out is the computerized web of criminal history storage systems that generated it. Within that web lies a history of federal fears to tread in state turf, even though the accuracy of criminal justice decisions was at stake.

To see the parallel trajectory of federal timidity and the ascendancy of judicial protection for state turfism, a few more steps back in time are needed. Before the era of *National League of Cities*, the federal government took a leadership role in the development of national criminal history reporting. Leadership called for delicate balancing between the dominance of states with regard to criminal history generation and the need

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163. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 1 (2004).

164. *E.g*, Sentencing Guidelines for the United States Courts, 18.U.S.C.S. app. §§ 4A1.1, 4A1.2 (2005).

165. ARTHUR W. CAMPBELL, THE LAW OF SENTENCING, § 11:1, at 482-83 (2004) (Presentence reports "provide information upon which judges base virtually all sentence determinations . . . . No single document has greater impact on criminal offenders than the presentence report.").

166. *See, e.g.*, PROB. DIV., ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT 11 (1984) (instructing probation officers that "[t]he identification record (fingerprint record) of the Federal Bureau of Investigation is a good source of information on the arrest record of a defendant."). The probation office may also contact courts and correctional agencies to get missing data and verify the accuracy of rap sheet information. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 22.

167. CAMPBELL, *supra* note 165, at 482-83.

for national leadership. A Congressional report framed the issue:

> Because of the decentralized nature of the U.S. criminal justice system and because the generation and use of criminal history information occurs mostly at the State and local levels of government, the States have a primary stake in establishing standards and procedures for the keeping and dissemination of criminal history information. On the other hand, minimum national standards also are required."[168]

In 1924, as fingerprint identification rapidly became a fixture in the criminal justice system, Congress directed the FBI to create an Identification Division to obtain and store fingerprint information to facilitate criminal identification.[169] The Identification Division began with 800,000 fingerprints, gleaned from the files of the federal prison at Leavenworth, Kansas, an FBI precursor called the Identification Bureau, and the International Association of Chiefs of Police, which had established the first "'national' criminal identification system."[170] Between the 1920s and mid-1960s, the FBI records were only manually searchable by name, other biographic identifiers, and FBI number.[171] The records were "fingerprint supported," meaning that each record had a fingerprint card to provide positive identification.[172]

In 1967, the FBI established the National Crime Information Center (NCIC).[173] The same year, a commission appointed by President Lyndon B. Johnson published a call for "a national law enforcement directory that records an individual's arrest for serious crimes, the disposition of each case, and all subsequent formal contacts with criminal justice agencies related to those arrests."[174] In response, the Department of Justice started Project SEARCH, a consortium of States with the duty of developing a computerized system for interstate exchange of criminal history information.[175]

In 1971, the FBI-initiated National Crime Information Center started a computerized criminal history system called CCH for short.[176] The CCH was superimposed over a patchwork of state criminal history collection efforts and "suffered the drawbacks of operating both as a

168. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, A PRELIMINARY ASSESSMENT OF THE NATIONAL CRIME INFORMATION CENTER AND THE COMPUTERIZED CRIMINAL HISTORY SYSTEM 3 (1978) [hereinafter A PRELIMINARY ASSESSMENT].

169. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 25.

170. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 25-26.

171. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26.

172. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26.

173. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26.

174. A PRELIMINARY ASSESSMENT, *supra* note 168, at 9. *See also* USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26 (detailing history).

175. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26.

176. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 27.

parallel system, as a supplement to the old arrangement, or in competition with it as the older system was developed and expanded with new technologies."[177] Controversy surrounded the CCH over centralization of control in the FBI, the impact on privacy rights, and fears of overstepping federalism bounds.[178] Spotty state cooperation stymied effective growth. Despite heavy federal funding to the states, by 1978, only a dozen states and the federal government contributed to the CCH.[179] New York and Pennsylvania, two early participants, withdrew shortly after starting, refusing to bear the cost of updating records stored federally that duplicated those held in their state databases.[180]

In 1972, the Department of Justice also began giving money to states to develop information technology that would facilitate computerization of records.[181] The Comprehensive Data Systems program, as the funding program was called, is the precursor to some of the federal-to-state funding programs of today.[182]

Also in the early 1970s, Congress considered several proposals for uniform national standards for state and localities in the handling of criminal history information.[183] Strategies for managing criminal history collection and dissemination evolved against a backdrop of hesitation to impose tough standards because of federalism fears. Attempts to come up with federal legislation governing collection and dissemination of criminal history information foundered on federalism questions relating to management, oversight, and planning.[184]

Instead, Congress gestured vaguely at data quality improvement by amending the Omnibus Crime Control and Safe Streets Act of 1968[185] to say broadly and generally that criminal history record information collected, maintained, or disseminated by state and local agencies receiving federal financial support under the Act must be "complete and secure" and available for review and challenge by record subjects.[186] The amendment set no specific standards.

The Justice Department only filled in the vast gray area in the broad

177. A PRELIMINARY ASSESSMENT, *supra* note 168, at 9.

178. A PRELIMINARY ASSESSMENT, *supra* note 168, at 3.

179. A PRELIMINARY ASSESSMENT, *supra* note 168, at 3, 7.

180. A PRELIMINARY ASSESSMENT, *supra* note 168, at 7.

181. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 26.

182. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, STATE-LEVEL STATISTICAL ANALYSIS CENTERS AND INFORMATION NETWORK PROGRAM, *iii* (1996) (stating that the federal funding program for establishing criminal history analysis centers in each state was first established in 1972 as a component of the Comprehensive Data Systems Program).

183. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW 4 (2003) [hereinafter COMPENDIUM].

184. A PRELIMINARY ASSESSMENT, *supra* note 168, at 3.

185. Omnibus Crime Control and Safe Streets act of 1968, Pub. L. No. 90-351, § 3789g(b), *amended by* Crime Control Act of 1973, Pub. L. No. 93-83, § 524(b), 87 Stat. 197 (1973).

186. Omnibus Crime Control and Safe Streets Act of 1968, *supra* at 185, *recodified at* Justice Assistance Act of 1984, Pub. L. No. 98-473, § 812(b).

language a little, "still leav[ing] the States wide discretion to set their own standards by State legislation and regulations."[187] In 1976, the Justice Department issued implementing regulations applicable to all states and local criminal justice agencies receiving federal money from the Department of Justice for support of criminal history record systems.[188] The key regulation setting forth data quality standards, 28 C.F.R. § 20.21, has remained largely unchanged in wording since the 1970s and remains in force today.

The regulation calls for covered states to generate operational plans for their criminal history records systems to "ensure that criminal history record information is complete and accurate."[189] "Complete" means that a record of an arrest "must contain information of any dispositions occurring within the State within 90 days after the disposition has occurred."[190] "[A]ccurate means that no record containing criminal history record information shall contain erroneous information."[191]

To attain this aspiration, state and local agencies must do two things. First, "criminal justice agencies shall institute a process of data collection, entry, storage, and systematic audit that will minimize the possibility of recording and storing inaccurate information;" second, "upon finding inaccurate information of a material nature," the agencies must "notify all criminal justice agencies known to have received such information."[192]

The regulation also made provision—at least aspirationally—for two modes of accuracy checks. First, the regulation required the state's operational plan to ensure that the state conduct "annual audits of a representative sample of State and local criminal justice agencies chosen on a random basis" to verify adherence with the implementing regulations.[193] Second, the regulation required operating plans to permit record subjects to view information kept on them to ensure accuracy and completeness.[194]

With each plan, the state had to submit a certification that "to the maximum extent feasible action has been taken to comply with the procedures set forth in the plan."[195] "Maximum extent feasible" meant actions that did not entail "additional legislative authority or involve unreasonable cost or [did] not exceed existing technical ability."[196]

The federal review provided for in the regulations was an eyeball in the 1970s. All procedures in the state plan were to be operational and

187. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 47.
188. 28 C.F.R. § 20.20 (2004); COMPENDIUM, *supra* note 183, at 4.
189. 28 C.F.R. § 20.21(a) (2004).
190. *Id.* § 20.21(a)(1).
191. *Id.* § 20.21(a)(2).
192. *Id.* § 20.21(a)(2).
193. *Id.* § 20.21(e).
194. *Id.* § 20.21(g).
195. *Id.* § 20.22(a).
196. *Id.* § 20.22(a).

implemented by March 1, 1978 and certification was due then.[197] Within ninety days of receipt of the plan, the Department of Justice would examine the adequacy of the plan and certification.[198] Evaluation of the plan would "be based upon whether the procedures set forth [would] accomplish the required objectives."[199] Evaluation of the certification would "be based upon whether a good faith effort [had] been shown to initiate and/or further compliance with the plan and regulations."[200]

The implementing regulations conclude with frail teeth. The penalties provision states that any agency or individual violating the regulations will be "subject to a civil penalty not to exceed $10,000 for a violation occurring before September 29, 1999, and not to exceed $11,000 for a violation occurring on or after September 29, 1999."[201] The most significant sanction is phrased more as a warning: "In addition," the Department of Justice "may initiate fund cut-off procedures" against recipients of federal financial assistance.[202] Unsurprisingly, well past the deadline for implementation, in 1982, many states were unable to fully implement the regulation.[203]

In the 1980s, as data quality continued to be problematic, the debate continued over whether all records should be stored in a central national repository or whether the criminal history information storage should be broken up into many fiefdoms.[204] The prevailing view was division into fiefdoms—no matter how counterintuitive for data quality. The tilt was toward decentralization because generation and use of criminal history primarily occurs at the state- and local-level—and states and localities wanted control.[205]

The federalism theory then dominant was the impenetrable state functions view of *National League of Cities*. And the tenor of the dialogue over the reform of the rap sheet was tinged with *National League of Cities*' state turfism. Criminal history reporting was then—as it is now—"viewed as primarily a law enforcement effort."[206] And law enforcement was one of the traditional state functions identified in *National League of Cities*.[207]

A Congressional report of the era noted: "State governments have basic jurisdiction over law enforcement and criminal justice within their

197. *Id.* § 20.23.

198. *Id.* § 20.23.

199. *Id.* § 20.23.

200. *Id.* § 20.23.

201. *Id.* § 20.25.

202. *Id.* § 20.25.

203. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 144.

204. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, AN ASSESSMENT OF ALTERNATIVES FOR A NATIONAL COMPUTERIZED CRIMINAL HISTORY SYSTEM ix (1982) [hereinafter AN ASSESSMENT OF ALTERNATIVES].

205. *Id.* at 142.

206. Hillsman, *supra* note 162, at 55.

207. Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

border under their constitutionally reserved powers, and many have been reluctant to share this jurisdiction with the Federal Government except with respect to Federal offenders."[208] Of course, states were happy to accept federal money for development of their records systems so long as the support was offered "on a voluntary basis and the States retained control over the operation and use of their own criminal history record systems."[209] Given the law at the time, the report treated turfism as right and proper and noted that many proposals for a national system "encounter difficulties resulting from the historic constitutional division of powers and duties in our Federal system."[210]

During the brief regime of *National League of Cities*, decentralization won out. By the 1980s, the FBI bowed to complaints about the practicality and cost of a national centralized system and phased out the CCH program, replacing it with a decentralized program ceding much control to the states.[211] The FBI lost steam in pushing the development of the CCH, and, in a 1976 memorandum, explained why: "lack of state participation, underestimation of costs and effort which would be required to establish, collect and maintain data for the more elaborate CCH record format; nonexistent or slowly developing State technologies; a lack of required discipline and cooperation within State criminal justice systems; and the controversy surrounding establishment of the CCH file."[212] Given the traditional state functions doctrine of the time, Congress had limited ambit to overcome state turfism with federal standards and coordination.

The system that reformers chose instead lets states be the master of their criminal history and ties the fiefdoms together through an "index-pointer" method.[213] The FBI maintains the Index, called the Interstate Identification Index (III), "which includes names and identifying data concerning all persons whose automated criminal history records are available by means of the III system."[214] The Index "points" the searcher to the state repositories holding records on the subject. Every state, as well as the District of Columbia and Puerto Rico, has a state-level central criminal history repository.[215] Criminal history is compiled by the state in which the case originates and is stored by the state's central repositories.[216]

Typically, an arrest triggers the creation of a criminal history record for the case.[217] All states statutorily require reporting of arrest

208. AN ASSESSMENT OF ALTERNATIVES, *supra* note 204, at 142.

209. AN ASSESSMENT OF ALTERNATIVES, *supra* note 204, at 143.

210. AN ASSESSMENT OF ALTERNATIVES, *supra* note 204, at 142.

211. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 27.

212. A PRELIMINARY ASSESSMENT, *supra* note 168, at 12.

213. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 76.

214. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 76.

215. COMPENDIUM, *supra* note 183, at 6.

216. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 23.

217. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 12. Not all cases begin with an arrest, however. Some begin with a citation or summons—basically orders to appear—in lieu of

information.[218] Almost all states mandate arresting agencies to report arrests for felonies or serious misdemeanors to a central state repository for criminal history information.[219] Typically, arresting agencies must also send fingerprints so that the record can be positively identified with the defendant and linked with prior arrest and convictions.[220] A "positive identification" uses unique and unalterable biometric features, such as fingerprints, retinal images, or voiceprints, to determine identity.[221] The booking agency generally gets three sets of fingerprints—one for the agency, and two for the state repository, which will forward prints to the FBI in certain cases.[222]

Shortly after the move to decentralize with the III, *Garcia* rejected the traditional state function standard of *National League of Cities*. But the III remains in place today. Governance strategies unfold against the backdrop of law, and when law changes, governments that have committed infrastructure and political capital to a course cannot easily reverse. And past timidity in regulation does not easily recede.

The national government remains timid about mandating and policing criminal history reporting quality standards. The timidity is understandable in light of the revival of the traditional state functions doctrine. Despite a plethora of federal funding programs for State criminal history reporting systems,[223] there have been no mandatory conditions concerning the content of criminal history records.[224] The FBI and Bureau of Justice Statistics have issued *voluntary* reporting standards with *recommended* minimum data elements for arrest and disposition information reporting.[225] And despite valiant efforts at proposing model formats for criminal history records, adoption of a model format has never been made mandatory.[226] The result of federal timidity is a confusing welter of formats, policies on information reporting and data quality differences. The difficulties stemming from the welter will be analyzed in the next section.

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arrest and booking. Fingerprints must be taken later in the proceedings, after the defendant has appeared. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 12-13.

218. COMPENDIUM, *supra* note 183, at 6.

219. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 12.

220. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 12.

221. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2001, vii (2003) [hereinafter SURVEY].

222. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 61.

223. *E.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM: IMPROVING CRIMINAL HISTORY RECORDS FOR BACKGROUND CHECKS 1 (2003); *see also* USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 43, 95-96 (detailing funding programs).

224. INCREASING THE UTILITY, *supra* note 148, at 10.

225. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 43.

226. INCREASING THE UTILITY, *supra* note 148, at 10.

IV. Federal Timidity's Costs

A. The Standards Patchwork and Persistent Data Quality Problems

Consigned to the standards patchwork of more than fifty jurisdictions, the criminal rap sheet is unsurprisingly deplored as incomplete, difficult to decipher and sometimes even plain inaccurate. In 1999, federal law enforcement records indicated that incomplete criminal history records at the State level—particularly incomplete reporting of dispositions—lead to firearms sales in the previous seven months to about 1,700 people barred from owning or possessing weapons by the Brady Act.[227] An official with the National Center for States Courts has acknowledged the "great disparity across and within States with regard to disposition reporting."[228] The problem used to be technology but in recent decades, as technology has flowered, the impediment is "our governmental structure, not just State/Federal and State/local, but also interbranch and interagency."[229]

Criminal justice officials "generally agree that unreported arrests and missing or incomplete disposition data constitute the principal data quality problem afflicting criminal history record systems."[230] A particular headache for officials attempting to predicate decisions on criminal history are arrests and charges for which no disposition is noted or dispositions unlinked to particular charges.[231]

Only ten States estimate that they receive final disposition notices from either the prosecuting office or court in all cases.[232] Only 14 States and Puerto Rico, which together hold just twenty-seven percent of the criminal history records in the United States and its territories, have final dispositions reported for eighty percent or more of the arrests in their databases.[233] In only sixteen States and Puerto Rico are final dispositions reported for eighty percent or more of arrests within the last five years.[234] The jurisdictions account for about forty-three percent of the population of the United States and its territories.[235] The jurisdictions also account for about forty-three percent of the criminal history records in the United States and its territories.[236] Underreporting of charges risks hiding the gravity of a defendant's criminal history and preventing accurate calculation of an

227. Craig Whitlock, *Delays in FBI Checks Put 1,700 Guns in the Wrong Hands; System Failed to Detect Banned Buyers Within Time Limit*, WASH. POST, June 25, 1999, at A01.

228. Hillsman, *supra* note 162, at 55.

229. *Id.* at 55.

230. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 39.

231. INCREASING THE UTILITY, *supra* note 148, at 10.

232. SURVEY, *supra* note 221, at 4.

233. SURVEY, *supra* note 221, at 2.

234. SURVEY, *supra* note 221, at 2.

235. SURVEY, *supra* note 221, at 2.

236. SURVEY, *supra* note 221, at 2.

appropriately deterrent sentence.

State repositories commonly receive dispositions that do not match charges initially reported by the police, making the nature of the final charge of conviction unclear.[237] Initial police charges can be changed after prosecutorial screening, grand jury scrutiny or plea bargaining.[238] Plea bargaining in particular often leads to changed charges that may not make it into a repository update. If the charge of conviction is ambiguous or misstated on a rap sheet, the defendant may be exposed to enhancements or penalties which should not be leveled or get a worse plea bargain than would otherwise be made.

The overwhelming majority of jurisdictions—forty-seven in all—sometimes receive final court dispositions that they cannot link to arrest information.[239] The percent of unlinkable dispositions varies from less than one percent in Nevada to fifty percent in Indiana.[240] Twenty-three states and the Virgin Islands simply do not enter unlinked court information—leaving the records open.[241] Where no disposition is noted, a rap sheet reader cannot count what may have been a conviction as one—posing a risk that the gravity of a defendant's criminal history is not revealed, resulting in an insufficiently deterrent sentence.

Failure to note dismissal of charges is another major concern.[242] When an arrest is noted and no disposition recorded, the prosecution appears to be pending, particularly if recent. And even if not recent, the open listing generates confusion and frustration. Because rap sheets are notoriously incomplete, an open record may simply mean a delay or failure in disposition reporting. Though thirty-three States specifically require case declinations to be reported to the State central repositories,[243] failure to send notices remains a problem even in the States that mandate that agencies send notices.[244]

Rap sheet users also cannot count on rap sheets being complete in terms of all convictions being listed. Jurisdictions vary on what kinds of misdemeanors—if any—are included on the record.[245] Some States only submit fingerprints for felony offenses though most States report felonies and usually the two or three most serious classes of misdemeanors.[246] This variation may make defendants with similar criminal histories appear different on their rap sheets, depending on the information storage and reporting policies of the jurisdictions in which they committed their crimes.

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237. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 40.
238. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 40.
239. SURVEY, *supra* note 221, at 7.
240. SURVEY, *supra* note 221, at 7.
241. SURVEY, *supra* note 221, at 7.
242. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 13.
243. COMPENDIUM, *supra* note 183, at 6.
244. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 13-14.
245. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 41.
246. INCREASING THE UTILITY, *supra* note 148, at 14.

This undermines the goal of avoiding unwarranted sentence disparities among defendants who in actuality have similar records.

Another major problem stemming from the patchwork is rap sheet decipherability. Criminal history record formats between states "vary so greatly that it is probably true that no two State criminal history record formats are identical and many of them are not even similar."[247] What is reported differs widely—from little more than arrest charges and final dispositions to bail and pretrial release data, detention data, charge modifications by prosecutors, and correctional entry and release data.[248]

Many states have not generated criminal history records in the content, format, and time-frame needed for court purposes.[249] For example, courts "need historical data on all dispositions, not just felonies and gross misdemeanors, and they need information on failures to appear, violent behavior and other incidents."[250] Timing is critical—for pretrial release decisions, for example, the information is needed within twenty-four hours of arrest.[251]

Because of "these differences and deficiencies in format, content, and terminology, many of the criminal history records currently circulated by the repositories are difficult to decipher"—even by officials in the criminal justice system.[252] The confusing welter of codes and formats introduce a significant risk of downstream reader error.[253]

The decentralization of criminal history with the III has made the confusion even worse. Before, the FBI was responsible for responding to most national searches and used a standard familiar format for the rap sheet generated from information in FBI databases.[254] But the index-pointer approach of the III directs searchers to retrieve records straight from the various state repositories—which spits out information in a confusing pastiche of formats and codes.[255] As former state governor Dick Thornburgh noted, the confusing-to-read rap sheets have posed a problem in law enforcement.[256]

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247. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 41.

248. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 41. For example, release from state prison must be reported to the repository in twenty-eight states, the District of Columbia, and Puerto Rico. SURVEY, *supra* note 221, at 3. Release from county jail must be reported in only fifteen states, the District of Columbia, and Puerto Rico. SURVEY, *supra* note 221, at 3. Probation information must be reported in thirty-one states, the District of Columbia and Puerto Rico. *Id.* Parole information must be reported in thirty states, the District of Columbia and Puerto Rico. SURVEY, *supra* note 221, at 3.

249. Hillsman, *supra* note 162, at 56.

250. Hillsman, *supra* note 162, at 56.

251. Hillsman, *supra* note 162, at 56.

252. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 42.

253. *See, e.g.*, Lechner v. Frank, 341 F.3d 635, 638-39 (7th Cir. 2003) (considering case where probation officer misread rap sheet and inaccurately stated in presentence report that the defendant had four prior convictions rather than one prior conviction and three prior arrests).

254. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 42.

255. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 42.

256. Dick Thornburgh, Keynote Address, *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF

Though auditing is generally the most effective measure to ensure data quality, only a little over half of jurisdictions—thirty-seven states—statutorily require their central repositories to conduct a data quality audit.[257] Twenty-eight jurisdictions require continuing or periodic audits.[258] Only fifteen states statutorily mandate both an in-house repository audit and audits of contributing agencies.[259]

Twenty-five jurisdictions reported in 2001 that no data quality audit had been conducted in the last five years and twenty-four jurisdictions reported they were not planning an audit in the next three years.[260] Only twenty-five states and Puerto Rico anticipated performing data quality audits in the three-year period following 2001.[261] Audits are important. Twenty-two of twenty-seven states where audits were performed instituted changes to improve data quality based on the audits.[262]

Given the confusing welter, it is no surprise that "[t]he type of incorrect information most consistently triggering reversal is that referring to prior 'convictions.'"[263] Beyond the numbers and official admissions of rap sheet difficulties, the most forceful illustration of the rap sheet problem comes in the cases where things went wrong because of bad rap sheet information.

B. The Cost to Justice

Because unreported arrests and missing or incomplete disposition data are the principal rap sheet problems,[264] the typical danger will be underestimation of the gravity of a defendant's criminal history and inadequate deterrence. In trying to fashion a sufficiently deterrent sentence or an appropriate plea bargain, courts and prosecutors may not have all the defendant's convictions before them, and thus may underestimate the need for deterrence.

Inadequate deterrence is a serious societal and criminal justice concern. But it is not the only concern. There is the possibility of another grave cost to justice as well. A death penalty case illustrates: A jury found Cornelius Lewis guilty of murdering a bank security guard during a robbery.[265] During the hearing on whether to sentence Lewis to death, the

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JUSTICE, NATIONAL CONFERENCE ON IMPROVING THE QUALITY OF CRIMINAL HISTORY RECORDS: PROCEEDINGS OF A BJS/SEARCH CONFERENCE, 6 (1992). Thornburgh had become U.S. Attorney General at the time of his commentary.

257. COMPENDIUM, *supra* note 183, at 7.

258. COMPENDIUM, *supra* note 183, at 7.

259. COMPENDIUM, *supra* note 183, at 8.

260. SURVEY, *supra* note 221, at 8.

261. SURVEY, *supra* note 221, at 8.

262. SURVEY, *supra* note 221, at 8.

263. CAMPBELL, *supra* note 165, § 9:7, at 372 (2004).

264. USE AND MANAGEMENT OF CRIMINAL HISTORY, *supra* note 1, at 39.

265. Lewis v. Lane, 832 F.2d 1446, 1449 (7th Cir. 1987).

prosecutor asked Lewis's attorney to stipulate to the accuracy of Lewis's FBI rap sheet, which indicated Lewis had four prior felony convictions.[266] The prosecutor had certified copies of two of the convictions but could not get copies for two other listed convictions, felonious assault with a knife in 1965, and felonious assault with a tire iron in 1966.[267]

The defense attorney showed the rap sheet to Lewis and asked him if the information was accurate.[268] But the defense attorney did not explain to Lewis the difference between a misdemeanor and a felony or the difference between an arrest and conviction.[269] Lewis said he thought the rap sheet was accurate so his lawyer stipulated to the accuracy.[270]

At the death penalty hearing, the prosecutor told the jury Lewis had four prior convictions, including convictions for assault with a knife and tire iron.[271] The prosecutor emphasized the prior convictions:

> Here's a man who began a career of criminal activity in 1965 and 1966, with attempted assault with a knife, felonious assault with a tire iron, thirteen years ago. He then graduated, feeling that New York was no longer safe for his criminal pursuits, moved on to California. And in California committed second degree robbery . . . . And after he was released from the penitentiary in California, he moved to Minnesota . . . worked on his talents there, and graduated to bank robbery . . . . I think that the evidence in this case, prior criminal convictions of this defendant simply show that he is a totally anti-social human being. And I think that your decision as to what ought to be done with him now ought to be made in that light.[272]

Given the "light" the prosecutor created, based on the rap sheet, the jury sentenced Lewis to death.[273]

When Lewis appealed, the State's Attorney's Office again tried to get certified copies of the New York convictions.[274] An Assistant State's Attorney and an Assistant Attorney General succeeded this time in getting certified records showing that the 1966 tire iron assault charge had been dismissed and the 1965 charge denoted as attempted felonious assault with a knife had actually been plead down to a misdemeanor assault conviction.[275] In other words—the rap sheet had been wrong, and the

266. *Id.* at 1454-55.
267. *Id.* at 1455.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 1449.
274. *Id.* at 1445.
275. *Id.* at 1455-56.

prosecutor's argument to the jury during the death hearing in reliance on the rap sheet had been wrong.

At this juncture, the prosecutors should have admitted error. Justice would have borne the expense of another death penalty hearing occasioned by the inaccurate rap sheet. New proceedings would have been costly—a collateral consequence of rap sheet problems—but the cost would have been much less than the toll on the integrity of the justice system and its officials. But the prosecutors did not confess error and, indeed, referred to the stipulation of accuracy though knowing the rap sheet was wrong.[276] The Illinois Supreme Court affirmed Lewis's death penalty conviction.[277]

Only after certiorari was pending for the second time before the U.S. Supreme Court was Lewis, with the help of the NAACP Legal Defense Fund in New York, able to get records showing the accurate disposition of his New York convictions.[278] By the time the Seventh Circuit granted Lewis habeas relief based on the error, Lewis had been on death row, under apprehension of death, for more than two years.

Cornelius Lewis's case is just one of several where wrong rap sheet information may have lead to a miscarriage of justice. There are other cases of claimed injustice tucked away into the state and federal reporters, and submerged within unpublished dispositions.[279] Presentence reports, on which judges so heavily rely for sentencing, have inaccurately characterized a defendant's criminal history because of rap sheets.[280] A person has been arrested based on inaccurate criminal history retrieved by a police officer.[281]

These cases show the toll on justice posed by federal timidity. The next section shows how a full vision of federalism generates a countervailing principle to the traditional state functions doctrine that counters the chilling effect on necessary federal leadership.

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276. *Id.* at 1456.

277. *Id.*

278. *Id.*

279. *E.g.*, Arizona v. Evans, 514 U.S. 1, 4-5 (1995) (considering case where a defendant was arrested based on inaccurate computerized criminal history information retrieved by a police officer); Lechner v. Frank, 341 F.3d 635, 638-39 (7th Cir. 2003) (considering case where probation officer misread rap sheet and inaccurately stated in presentence report that the defendant had four prior convictions rather than one prior conviction and three prior arrests); McCloud v. United States, 917 F.2d 28 (9th Cir. 1990) (unpublished table decision) (considering case where defendant contested "grossly inaccurate and misleading" presentence report that included nine arrests not prosecuted to judgment); *see also* Navarro v. City of South Gate, 81 F. App'x. 192, 196 (9th Cir. 2003) (unpublished table decision) (rejecting § 1983 petitioner's claim that officers submitted an inaccurate rap sheet that lead to an unwarranted $55,000 increase in his bail for lack of documentation of the claim).

280. *Lechner*, 341 F.3d at 638-39; *McCloud*, 917 F.2d 28 (mem.).

281. *Evans*, 514 U.S. at 5.

V. Developing the National Leadership Principle

A. The Countervailing Bright-Line Rule

The case study of the criminal rap sheet shows the critical need for development of the nascent countervailing principle to the traditional state functions doctrine to permit federal leadership and coordination when necessary on problems submerged in state spheres. The need goes beyond the prudential. The history of the traditional state functions doctrine shows the countervailing principle, though nascent, is of constitutional dimension, derived from the structure of federalism just as the traditional state functions doctrine is adduced from the structure of federalism.

The intellectual author of the traditional state functions doctrine, Justice Rehnquist, permitted intervention for "serious problems" where "collective action by the National government" is necessary.[282] The contours of the countervailing principle were left undefined, however. Justice O'Connor noted in 1982 that the Court recognized that "'the nature of the federal interest advanced may be such that it justifies state submission.'"[283] But "the Court has not yet explored the circumstances that might justify such an exception."[284] The Court still has not.

The Court has made clear that the state functions doctrine is a "functional doctrine" not meant to blindly seal off "a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which States enjoy a separate and independent existence not be lost through undue federal interference in certain core state functions."[285] The converse of the "functional" federalism-derived doctrine and "the unique benefits of a federal system" is national leadership and coordination when necessary.

Federalism's full promise is not achieved when it is wielded solely as a shield for the states and neglects the place in constitutional design for federal leadership and coordination when needed.[286] As Akhil Reed Amar has noted, the federalism of the Constitution was brought into being when it became apparent there was a need for leadership and coordination to avoid the "shambles" when states exercised their prerogatives under the Articles of Confederation in disarray.[287] American federalism is not the system of the Articles of Confederation. It is the system of the Constitution that

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282. National League of Cities v. Usery, 426 U.S. 833, 853 (1976).

283. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 778 n.4 (1982) (O'Connor, J., concurring in judgment, dissenting in part) (quoting Hodel v. W. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981)).

284. *Id.*

285. EEOC v. Wyoming, 460 U.S. 226, 236 (1983) (quoting *Nat'l League of Cities*, 426 U.S. at 845

286. *Cf.* NOONAN, *supra* note 138, at 3 ("Federalism, in its classic sense, stands for recognition of the role of the states in the sphere that the constitution allots them in a framework explicitly conferring great powers on the national government. We are not a confederacy of sovereigns as the secessionists believed.").

287. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447-48 (1987).

supplanted the Articles of Confederation.

Due regard for the constitutional role of the national government in offering leadership on problems requiring a coordinated solution demands a countervailing approach for problems requiring a nationally-coordinated solution. Post-Articles of Confederation federalism is not just about division and turfism. It is also about relative competence between levels, and national leadership when needed.

Unrestrained by provision for national coordination when necessary, the traditional state functions doctrine partakes more of the repudiated and unworkable Articles of Confederation federalism than the Constitutional system. But it need not be that way. Part II traced the vein of a nascent countervailing principle from its roots in Justice Rehnquist's caveat and Justice Blackmun's concurrence in *National League of Cities* through to *National League of Cities*'s demise.

In formulating the traditional state functions doctrine, the Court has recognized the national leadership aspect to federal design. Key to defining the contours of the countervailing principle is Justice Blackmun's caveat—and the condition for his swing vote in *National League of Cities*. Justice Blackmun wrote that the traditional state functions doctrine "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[288] *Hodel* would later restate the caveat thus: "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[289]

Though Justice Blackmun called his caveat a "balancing approach" in his sketch was the root of a standard, not just ad hoc balancing.[290] What fully-realized federalism requires is a countervailing, bright-line rule recognizing the role of national leadership on problems requiring a coordinated solution. What federalism calls for is a countervailing principle, not a subjective value-laden exception or ad hoc balancing. In as value-charged, contested and quickly-contorting a field as federalism doctrine, ad hoc balancing is not the solution. Ad hoc balancing does not give due force to a principle derived from federal structure. Ad hoc balancing suggests a concession to the prudential, not derivation in constitutional structure.

Indeed, the Court has rejected ad hoc balancing in its anti-commandeering cases.[291] In *New York v. United States*, Justice O'Connor firmly rejected the suggestion that Congress can commandeer states when the federal interest is great enough to justify state submission. "No matter how powerful the federal interest involved," Justice O'Connor wrote for the

288. Nat'l League of Cities v. Usery, 426 U.S. 833, 856 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

289. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981).

290. *See Nat'l League of Cities*, 426 U.S. at 856.

291. New York v. United States, 505 U.S. 144, 178 (1992).

Court, "the Constitution simply does not give Congress the authority to require the States to regulate."[292]

The counterweight to what has crystallized as a bright-line rule shielding traditional state turfs is a similarly bright-line rule to demarcate an area for federal leadership, similarly derived from the constitutional design of federalism. A bright line rule, in contrast to ad hoc balancing, is less of an "invit[ation to] an unelected federal judiciary to make decisions about which state policies it favors and which one it dislikes"—and about which federal policies are favored, for that matter.[293] More fundamentally, a bright-line rule reflects the derivation of the national coordination principle from constitutional federal structure.

The key criterion for the principle is evident in Justice Blackmun's original formulation. Justice O'Connor also saw it: "Whatever the ultimate content of that standard," Justice O'Connor noted, "it must refer not only to the weight of the asserted federal interest, but also to the necessity of vindicating that interest in a manner that intrudes upon state sovereignty."[294]

Distilling the criterion to its bright-line essence, the touchstone should be the necessity of federal policy coordination and leadership. The nature of the problem must be such that it would persist absent uniform federal standards. Such a problem would impact citizens across states and if any State were to opt out of federal regulation, the externalities would be suffered by all other states. Under these circumstances, federalism requires that the national government be allowed to realize its constitutionally ordained role as a policy coordinator and leader, even if the problem Congress addresses is submerged in a domain, like criminal law, denominated a traditional state sphere.

When Congress legislates on problems requiring a coordinated solution, the presumption of impropriety deriving from the traditional functions doctrine should be inverted. Interpretation of whether the legislation falls within an enumerated source of Congressional legislative power should begin with an interpretive receptiveness, though the legislation affects an issue submerged in a traditional state sphere.

Of course, perceived need for national coordination cannot alone "call into life a power which has never lived."[295] But recognition of the role in federalist design for national leadership on issues requiring coordinated solutions can suspend the rule of constrictive reading of "a living power already enjoyed."[296]

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292. *Id.*

293. *Garcia*, 469 U.S. at 546.

294. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 782 n.8 (1982) (O'Connor, J., dissenting).

295. *Nat'l League of Cities*, 426 U.S. at 853 (quoting Wilson v. New, 243 U.S. 332, 348 (1917) (internal quotation marks omitted).

296. *Id.*

B. Practical Application—Reforming the Criminal Rap Sheet

Theory and principle gain meaning when embodied in practice. This section analyzes how the national coordination principle would apply to reforming the criminal rap sheet. Reforming the criminal rap sheet is a paradigmatic example where the principle would apply. Reforms call for national policy coordination and innovation and creative applications of Congress' enumerated powers to legislate. Such Congressional creativity and policy innovation on a problem submerged in a traditional state sphere needs a rule of receptivity to succeed.

To create a reliably and consistently accurate rap sheet, centralized standards on disposition reporting and accuracy verification are needed. Otherwise, if disposition reporting and accuracy check measures vary from jurisdiction to jurisdiction, the accuracy and completeness will vary unreliably from sheet to sheet, depending on which reporting jurisdictions have files on the defendant and the jurisdictions' disposition reporting and other accuracy measures. To obtain a rap sheet decipherable and meaningful to criminal justice system officials, the reporting format must be uniform in both style and substantive content.

Achieving uniform and reliable standards calls for creativity from Congress in crafting. It is axiomatic that Congress can only legislate under its enumerated sources of authority. And even if Congress finds an appropriate wellspring of enumerated authority, it must be careful in crafting not to run afoul of anti-commandeering rules forbidding direct commands to the states to enact legislation[297] and conscription of state officials to implement a federal regulatory regime.[298]

Congress can harness the spirit of a legal age where "everything old is new again."[299] Early Congressional legislation can be instructive for a fresh strategy to manage the modern-day rap sheet problem. Legislation by the first congresses following the creation of the Constitution "provide[] contemporaneous and weighty evidence of the Constitution's meaning."[300] Such legislation showcases the constitutionally possible in legislative crafting within Congress' enumerated powers.

Legislation by the first congresses evidence that the national government may direct state courts to collect and report information. The *Printz* Court collected the early legislation:

> [T]he first Congresses required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other

297. New York v. United States, 505 U.S. 144, 188 (1992).

298. Printz v. United States, 521 U.S. 898, 935 (1997).

299. Marc E. Johnson, *Everything Old Is New Again: Justice Scalia's Activist Originalism in* Schriro v. Summerlin, 95 J. CRIM. L. & CRIMINOLOGY 763 (2005).

300. Bowsher v. Synar, 478 U.S. 714, 723-24 (1986) (internal quotation marks omitted).

> naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155.[301]

Early legislation also prescribed fines for failures by court clerks to meet federal reporting requirements.[302] State courts, unlike state legislatures and executives, could be commanded by federal law to enforce federal law and "maintain . . . the ancillary functions of recording, registering, and certifying the citizenship applications."[303]

Herein lays a solution to the chief problem plaguing the criminal rap sheet: variable disposition reporting. Congress could mandate that state courts retain, in scanned retrievable form, prescribed judicial records made or used in adjudicating guilt. As a practical matter, the federal mandate must come with the federal funds for electronic storage systems upgrades and training in the state courts.

The need for national leadership on setting criminal history collection and retention standards is particularly acute after the 2005 decision of *Shepard v. United States*.[304] In *Shepard*, prosecutors faced with proving the nature of a defendant's past burglary convictions for purpose of a statutory sentence enhancement, ran into a problem: The state court had failed to retain the record of the plea colloquy and plea agreement in which the defendant would have admitted the circumstances surrounding the offense.[305] The prosecutor succeeded in getting police arrest reports and complaint applications which showed that the details of the burglaries satisfied the requisites for the enhancement—information the defendant did not contradict.[306] Nonetheless, *Shepard* held that disputed facts about a prior conviction triggering an increase in the prescribed maximum must be proven through conclusive judicial records made or used in adjudicating guilt.[307] As Justice O'Connor observed in dissent, this left sentencing and implementation of Congressionally-prescribed statutory enhancements dependent on disparate state record retention policies.[308]

The records requisite also poses a substantial burden to law enforcement. Currently, getting certified judgment and conviction documents is, to put it plainly, a big pain. Agents and officers whose time would be much better spent elsewhere have to serve as highly-trained administrative assistants, on the phone to clerks in disparate jurisdictions, seeking judgment and conviction documents that sometimes do not reliably

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301. *Printz*, 521 U.S. at 905-06.

302. *Id.* at 949 (Stevens, J., dissenting).

303. *Id.* at 908 n.2.

304. United States v. Shepard, 125 S. Ct. 1254 (2005).

305. *See Id.* at 1269 (O'Connor, J., dissenting).

306. *Id.* at 1258-59 (majority in part).

307. *Id.* at 1260, 1263 (majority in part, plurality in part).

308. *Id.* at 1269.

come, or do not come on time. Papers and files get lost or are tucked into storage, complicating matters more. The documents are key to accurate justice but getting them involves a highly inefficient process and diverts law enforcement man-hours better spent on important issues like investigation and catching criminals.

Congress can creatively solve the problem by mandating that state courts retain in electronically retrievable format scanned certified copies of judgments of conviction, plea documents, and charging documents. Federal legislation could also provide for information retrieval directly from the state courts using the Interstate Identification Index.

Currently, the Index retrieves information from various state repositories, which depends on court reporting for accurate information. Direct retrieval from the courts would ameliorate the current problem of information reporting resembling a game of "Telephone," with information lost along the way. With linkages to the Interstate Identification Index, accessing conclusive records made or used in adjudicating guilt can be as easy as clicking a button to download the electronically stored document. This would mitigate the waste of law enforcement man-hours spent on the phone to various jurisdictions, trying to track down and obtain criminal history records.

State repositories will, of course, still play a critical role in the foreseeable future because of the vast amount of past conviction information stored in the repositories and the current infrastructure set-up for retrieval from state repositories. Standardizing information retention and reporting standards for state repositories may appear to be a trickier question because the legislation must be predicated on an enumerated power and avoid anti-commandeering rules. But the Constitution offers a grant of authority in the Full Faith and Credit Clause. Article IV, Section 1 of the Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[309]

An accurate rap sheet effectuates the Full Faith and Credit Clause and is a "Manner in which [state] Acts, Records, and Proceedings" are "proved" to criminal justice officials—often in different jurisdictions—at various stages of proceedings, such as detention hearings, and plea bargain formulation. The Supreme Court has characterized early federal legislation[310] that mandated procedures state officials must follow during criminal extradition as an exercise of Article IV, § 1 power and outside the purview of its anti-

309. U.S. CONST., art. IV, § 1.

310. Extradition Act of 1793, Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302.

commandeering rules.[311] Similarly, congressionally prescribed procedures that state officials must follow in rap sheet information collection, storage, audits and dissemination fall outside the purview of anti-commandeering rules.[312]

Do these proposed reforms call for creative adaptation of congressional authority to the problems of the modern age and its mobile criminals? Yes, particularly with regard to the use of Article IV, § 1 authority. That is where the national coordination principle comes into play. The national coordination and leadership principle would suspend the rules of constrictive and crippling readings of federal legislation and legislative power under the traditional state functions doctrine. To permit full fruition of federalism design, the countervailing principle would instead have a receptive interpretive rule.

Just as the traditional state functions rule has inflected Court interpretation of the bounds of congressional power to enact legislation,[313] so the countervailing national coordination and leadership principle should inflect constitutional interpretation. The Court has in essence read Congressional legislative power to weaken in reach when it extends to traditional state functions out of respect for the role of States in provision of such services. Court scrutiny is therefore exacting when it comes to congressional enactments trenching on traditional state functions.[314]

For problems requiring nationally coordinated solutions, however, the national leadership principle suspends the rule of constrictive interpretation. The national coordination and leadership principle permits a converse rule of interpretation receptive to Congressional policy innovations. This ensures due respect for the role of national leadership and coordination in federal design and the full fruition of the federalism the Constitution wrought to supplant the state-centrism of the Articles of Confederation. And it ensures that problems submerged in state spheres requiring national coordination do not fester unaddressed because of federal timidity in the face of a powerful rule of noninterference with no countervailing principle.

311. Printz v. United States, 521 U.S. 898, 909 n.3 (1997).

312. Other statutes also impose reporting requirements, such as the requirement in 42 U.S.C. § 5779(a) that states and local law enforcement report missing children to the Department of Justice. The Court has not decided whether such "purely ministerial reporting requirements" pursuant to Commerce Clause authority are invalid. *Printz*, 521 U.S. at 935 (O'Connor, J., concurring). As discussed, however, Article IV, § 1 provides a more directly moored grant of authority to legislate in the case of rap sheet reporting.

313. *See supra*, Part II.C.2.

314. *See supra*, Part II.C.1.